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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ADOBE SYSTEMS, INC.,

No. C 08-2436 PJH (WDB)

Plaintiff,

v.

DEBRA TAVEIRA, and JUAN  
ROYAL,

Defendants.

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**REPORT AND  
RECOMMENDATION RE MOTION  
FOR DEFAULT JUDGMENT**

**Procedural Background**

Plaintiff Adobe Systems Incorporated ("Adobe") is a Delaware corporation with its principal place of business in California. Adobe develops and distributes computer software and, in connection with that enterprise, owns the rights to various copyrighted software. Adobe also uses a variety of registered trademarks in promoting and selling that software. First Amended Complaint, filed July 1, 2008, at ¶¶2, 7-11 and Ex. A - B. ("Complaint").

Defendant Debra Taveira is an individual and resident of New Jersey. Complaint at ¶12. Defendant Juan Royal is an individual and resident of New York. Complaint at ¶13.

1       On July 1, 2008, plaintiff filed its First Amended Complaint against  
2 defendants alleging that Adobe is the owner of copyrights in various computer  
3 software and the owner of registered trademarks used in the promotion and sale of  
4 that software and that defendants have violated exclusive rights granted to plaintiff  
5 in violation of the Copyright Act and Lanham Act. See, Complaint at ¶¶2, 7-11  
6 and Ex. A and B.

7       More specifically, plaintiff alleges that, using the internet, defendants have  
8 sold counterfeit copies of Adobe's computer software bearing marks identical to  
9 Adobe's registered trademarks in an attempt to "palm off" defendants' products as  
10 originating from Adobe. Complaint, at ¶¶3, 12-19.

11      Defendant Debra Taveira stipulated to entry of a permanent injunction, and  
12 plaintiff dismissed her from the lawsuit. See, Stipulation, filed August 22, 2008.

13      Plaintiff served defendant Juan Royal with a copy of the Complaint. See,  
14 Proofs of Service, filed August 14, 2008. Defendant Juan Royal has not responded  
15 to the Complaint or otherwise entered an appearance in this action.

16      In response to plaintiff's application for entry of default, the Clerk of the  
17 Court entered default as to Juan Royal on September 12, 2008.

18      On October 30, 2008, plaintiff filed its Motion for Default Judgment Against  
19 Defendant Juan Royal ("Motion"). District Judge Hamilton referred plaintiff's  
20 Motion for Default Judgment to the undersigned for Report and Recommendation.  
21 Order Referring Case, filed November 6, 2008. Plaintiff has served its Motion for  
22 Default Judgment on the defaulting defendant at his last known address. See,  
23 Proof of Service attached to Motion, filed October 30, 2008. Papers served on the  
24 defaulting defendant's last known address further notified defendant that this Court  
25 would conduct a hearing on January 14, 2009, in connection with the Motion for  
26 Default Judgment. Certificate of Service, filed December 22, 2008.

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1           On January 14, 2009, the Court conducted a duly noticed hearing in  
2 connection with plaintiff's Motion. No appearance was made on behalf of  
3 defendant Juan Royal.

4           Plaintiff seeks judgment against defendant on its trademark claim in the  
5 amount \$250,000.00, plus post-judgment interest at the statutory rate. Motion at  
6 10-14. Plaintiff also asks the Court to issue a permanent injunction prohibiting  
7 defendant from infringing plaintiff's rights in copyrighted computer software and  
8 prohibiting defendant from using Adobe's marks. See, Complaint at ¶¶6-8.

9           We make the following Report and Recommendation.

10           11 **I. Entitlement to Entry of Default Judgment**

12           13 Although plaintiff's Complaint alleges claims for copyright infringement and  
14 trademark infringement, plaintiff seeks entry of a monetary judgment against Juan  
15 Royal only with respect to plaintiff's second claim for trademark infringement.  
16 Motion at 5-8; Notice of Motion at ¶5; Transcript of January 14, 2009, hearing.

17           18 Plaintiff served defendant with the motion for default judgment. See, Proof  
19 of Service, filed October 30, 2008.

20           21 Defendant has failed to respond to the Complaint or otherwise to appear in  
22 the proceedings, and the Clerk of the Court entered default as to Juan Royal.

23           24 **A. Trademark Infringement**

25           26 To establish trademark infringement, a plaintiff must show that (1) plaintiff  
27 has a valid, protectable trademark, and (2) defendant's use of the mark is likely to  
28 cause confusion. 15 U.S.C. §1114; *Applied Information Sciences v. Ebay, Inc.*,  
511 F.3d 966, 969 (9th Cir. 2007).

29           30 Plaintiff has established that it has registered the trademarks listed at Exhibit  
31 B of the First Amended Complaint with the Patent and Trademark Office.

1 Complaint at ¶¶9-11 and Ex. B; Declaration of Chris Stickle, filed October 30,  
 2 2008, (“Stickle Decl.”), at ¶3 and Ex. E; Declaration of Nicole L. Drey, filed  
 3 October 30, 2008, (“Drey Decl.”), at ¶12; Transcript of January 14, 2009, hearing.  
 4 A federally registered trademark constitutes *prima facie* evidence of a valid,  
 5 protectable mark and the registrant's "exclusive right to use the mark on the goods .  
 6 .. specified in the registration." *Applied Sciences*, 511 F.3d at 970, quoting  
 7 *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d  
 8 1036, 1047 (9th Cir. 1999); 15 U.S.C. §1115(a). By virtue of his default,  
 9 defendant has failed to rebut this presumption. Therefore, plaintiff has satisfied the  
 10 first element of its claim for trademark infringement.

11 Plaintiff also must demonstrate that defendant's use of Adobe's registered  
 12 marks is likely to confuse purchasers about the source of defendant's products.  
 13 *Interstellar Starship Serv., Ltd., v. Epix, Inc.*, 304 F.3d 936 (9th Cir. 2002);  
 14 *Brookfield Communications, Inc.*, 174 F.3d at 1053.

15 Where a defendant knowingly adopts the plaintiff's mark with the intent to  
 16 capitalize on plaintiff's reputation the courts may presume that the public will be  
 17 deceived. *AMF Inc., v. Sleekcraft Boats*, 599 F.2d 341, 354 (9th Cir. 1979),  
 18 abrogated in part on other grounds by *Mattel Inc., v. Walking Mountain Prods.*,  
 19 353 F.3d 792 (9th Cir. 2003); *M2 Software, Inc. v. Madacy Entertainment*, 421  
 20 F.3d 1073, 1085 (9th Cir. 2005). Adobe alleges that Mr. Royal knowingly and  
 21 willfully adopted Adobe's marks with the intent to “palm off” his counterfeit  
 22 software as Adobe's. Complaint at ¶¶3-4, 14-19, 25-30. The well-pled allegations  
 23 of plaintiff's complaint have been deemed admitted by virtue of Mr. Royal's  
 24 default. *TeleVideo Sys., Inc., v. Heidenthal*, 926 F.2d 915, 917-918 (9th Cir.  
 25 1987). Moreover, unrebutted evidence submitted by Adobe could support an  
 26 inference that Mr. Royal knowingly engaged in a commercial enterprise to palm  
 27 off his counterfeit software to ebay consumers. Declaration of Christopher D.

1 Johnson, filed October 30, 2008, (“Johnson Decl.”), at ¶¶3-7; Stickle Decl., at ¶4;  
 2 Drey Decl., at ¶¶3-5, Exs. A-D and F. Accordingly, the Court may presume that  
 3 Mr. Royal's use of Adobe's marks will confuse and deceive purchasers of  
 4 defendant's software about the source of the purchased goods.

5 Additionally, even if the Court elects not to employ the presumption  
 6 recognized by the Ninth Circuit in *Sleekcraft* and *M2 Software*, plaintiff has  
 7 established that defendant's use of plaintiff's marks is likely to confuse purchasers  
 8 of defendant's software.

9 To assess likelihood of confusion, courts in the Ninth Circuit look to the  
 10 eight factors set forth in *Sleekcraft*, 599 F.2d 341. As our Court of Appeals has  
 11 emphasized, the *Sleekcraft* test “is pliant.” *Brookfield*, 174 F.3d at 1054.

12 Some factors are much more important than others, and the relative  
 13 importance of each individual factor will be case-specific. Although  
 14 some factors -- such as the similarity of the marks and whether the  
 15 two companies are direct competitors -- will always be important, it is  
 often possible to reach a conclusion with respect to likelihood of  
 confusion after considering only a subset of the factors.

16 *Id.*

17 In the internet context we focus on three of the *Sleekcraft* factors: “(1) the  
 18 similarity of the marks, (2) the relatedness of the goods and services, and (3) the  
 19 parties' simultaneous use of the Web as a marketing channel.” *Perfumebay.com,*  
*Inc., v. eBay Inc.*, 506 F.3d 1165, 1173 (9th Cir. 2007) quoting *Interstellar Starship*  
*Servs.*, 304 F.3d at 942. If these three factors suggest that confusion is likely, the  
 20 remaining *Sleekcraft* factors must weigh strongly against a likelihood of confusion  
 21 to avoid finding that defendant's use of the mark has infringed. *Id.*, at 1173-75.

22 Plaintiff alleges, and evidence submitted by plaintiff supports a finding that,  
 23 defendant uses marks identical to those registered by plaintiff to sell the same  
 24 kinds of goods sold by plaintiff, computer software. Complaint at ¶¶1-31; Johnson  
 25 Decl., at Exs. A-D. Additionally, both plaintiff and defendant market their  
 26 computer software on the internet. Motion at ¶7; Complaint at ¶13; Johnson at ¶3-  
 27  
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1 7.<sup>1</sup> Plaintiff's allegations and evidence are unrebutted by virtue of defendant's  
 2 default. We find that the three factors most pertinent in cases involving the  
 3 internet strongly suggest a likelihood of confusion. Therefore, we will recommend  
 4 that the District Court find that defendant is liable for trademark infringement  
 5 unless the remaining *Sleekcraft* factors strongly negate a finding that confusion is  
 6 likely. They do not.

7 On balance, the remaining *Sleekcraft* factors -- strength of plaintiff's mark,  
 8 actual confusion, degree of consumer care, defendant's intent, and likelihood of  
 9 expansion into other markets -- also support a finding of likely confusion.

10 Adobe alleges that its trademarks are exceptionally strong and have acquired  
 11 secondary meaning throughout the world. Complaint at ¶11. We also take judicial  
 12 notice that the name "Adobe" and at least some of Adobe's marks in connection  
 13 with certain kinds of computer software are ubiquitous on the internet. Defendant  
 14 currently sells goods that directly overlap and compete with goods sold by Adobe.  
 15 Furthermore, the unrebutted allegations of the complaint support a finding that  
 16 defendant intentionally adopted plaintiff's marks in order to "palm off" his  
 17 counterfeit software as emanating from Adobe.

18 The level of consumer care further weighs in plaintiff's favor. Plaintiff  
 19 contends that purchasers of software are likely to rely on brand recognition to  
 20 obtain reassurance that a product is reliable. Motion at 7. We agree that, to some  
 21 extent, consumers of computer software are likely to rely on brand recognition.  
 22 Computer software purchased by an individual for personal use tends not to be so  
 23 costly that the average consumer would expend significant resources researching  
 24 his or her options. *Compare, Sleekcraft*, 599 F.2d at 353-354 (purchasers of

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25  
 26 <sup>1</sup>Adobe does not submit evidence in support of its contention that it markets its computer  
 27 software on the internet. However, plaintiff asks the Court to take judicial notice of this fact by  
 28 examining Adobe's presence on the internet. Motion at 7:11-18. The Court takes judicial notice of the  
 fact that Adobe sells its computer software via the internet through www.adobe.com and other third  
 party retailers.

1 expensive boats are not likely to rely on branding alone in making purchases of  
 2 that magnitude). Plaintiff also notes that defendant's use of the internet for sales  
 3 obscures purchasers ability to determine that defendant's products are merely  
 4 pirated versions of plaintiff's products. Motion at 7.

5 The only factor that does not clearly weigh in plaintiff's favor is "evidence  
 6 of actual confusion." Plaintiff argues that the mere fact that consumers purchased  
 7 software from Mr. Royal constitutes evidence of actual confusion, but the  
 8 existence of these purchases gives us no information about what consumers  
 9 believed about the source of the products they were buying. Nonetheless, given  
 10 the procedural posture of this case, it would be unreasonable to expect plaintiff to  
 11 commit significant resources to gathering evidence of actual consumer confusion.  
 12 Where, as alleged here, defendant uses marks identical (or nearly so) to plaintiff's  
 13 marks on products that consist of pirated copies of plaintiff's product, we are  
 14 prepared to presume at least a sizeable amount of confusion about the source of  
 15 those products even if some customers are savvy enough to know they are buying  
 16 illicit copies of the software. Moreover, because evidence of actual confusion is  
 17 difficult to uncover, the absence of evidence on actual confusion is "generally  
 18 unnoteworthy." *Perfumebay*, 506 F.3d at 1176.

19 On the record before us, it is extremely likely that the parties' goods "would  
 20 be reasonably thought by the buying public to come from the same source."  
 21 *Sleekcraft*, 599 F.2d at n.10. Accordingly, we RECOMMEND that the District  
 22 Judge find that plaintiff has established a valid, protectable interest in its marks and  
 23 that Mr. Royal has infringed plaintiff's federally registered marks.

24 //

25 **B. Recommendation re Entry of Judgment by Default**

26 Plaintiff served defendant with the motion for default judgment. See, Proof  
 27 of Service, filed October 30, 2008.

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1           Defendant has failed to respond to the Complaint or otherwise to appear in  
2 the proceedings, and the Clerk of the Court entered default as to Juan Royal.

3           By failing to respond to plaintiff's Complaint, defendant admits all of the  
4 well-pled allegations of the Complaint relating to liability.

5           Moreover, plaintiff's evidence, uncontradicted by virtue of defendant's  
6 default, establishes the substantive merits of plaintiff's claim that defendant  
7 infringed plaintiff's trademarks.

8           The Court further finds that there is a significant risk of prejudice to plaintiff  
9 if its Motion is denied. Defendant appears to be self-consciously engaged in an  
10 unlawful enterprise. Moreover, defendant has done nothing to rebut plaintiff's  
11 plausible contention that if the Court declines to enter judgment defendant is likely  
12 to continue to infringe plaintiff's rights without fear of repercussions.

13           The Court also is satisfied that Juan Royal is not a minor or otherwise  
14 incompetent and is not on active duty in the military service. F.R.C.P. 55(b);  
15 Soldiers and Sailors Civil Relief Act of 1940, 50 App. U.S.C. §521(b). Plaintiff's  
16 counsel, Nicole Drey, submitted a declaration stating, "on information and belief,"  
17 that Mr. Royal was not a minor or in the military. Drey Decl., at ¶¶10-11. Because  
18 Ms. Drey did not set forth the factual basis for her assertion, her declaration is  
19 insufficient to support the requisite finding. However, at the January 14th hearing  
20 on this matter Ms. Drey represented to the Court that she spoke to Mr. Royal via  
21 telephone and asked him directly whether he was in the military and that he  
22 responded that he was not. Transcript January 14, 2009, hearing. Mr. Royal's  
23 statement constitutes an admission of a party-opponent. F.R.E. 801(d)(2). Ms.  
24 Drey further represented to the Court that, based on her investigation, Mr. Royal is  
25 a licensed real estate broker in the State of New York, and, therefore, it is  
26 improbable that he is under eighteen years of age.

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Given defendant's apparent awareness of plaintiff's claims<sup>2</sup> and of these proceedings, his complete failure to appear, the risk of prejudice to plaintiff resulting from the threat of continued violations of plaintiff's rights, the sufficiency of plaintiff's complaint, and the apparent merit of plaintiff's substantive claim, we RECOMMEND that the District Judge find that plaintiff is entitled to judgment by default against Juan Royal with respect to its second claim for trademark infringement. See, F.R.C.P. 55(b); *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986).

## II. Items of Relief Sought by Plaintiffs

### A. Statutory Damages

The Lanham Act permits a plaintiff to elect statutory damages, in lieu of actual damages, where defendant has used a counterfeit mark. 15 U.S.C. §1117(c). *See also, State of Idaho Potato Commission v. G&T Terminal Packaging, Inc.*, 425 F.3d 708 (9th Cir. 2005). The Court has discretion to award statutory damages of \$500.00 to \$100,000.00 “per counterfeit mark per type of goods or services sold, offered for sale, or distributed.” 15 U.S.C. §1117(c)(1). Furthermore, where plaintiff establishes that defendant’s infringement was “willful” plaintiff may seek an award of up to one million dollars per violation. 15 U.S.C. §1117(c)(2).<sup>3</sup>

The unrebutted allegations of the complaint establish that defendant used counterfeit versions of plaintiff’s marks and that defendant’s conduct was “willful.” Complaint at ¶¶3, 12-19, 25-30. *See also, Derek Andrew, Inc., v. Poof Apparel Corp.*, 528 F.3d 696, 702 (9th Cir. 2008) (allegation of willfulness deemed

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<sup>2</sup>Plaintiff’s evidence supports an inference that counsel for plaintiff had at least one phone call with Mr. Royal on June 12, 2008. Drey Decl., at ¶4.

<sup>3</sup>Effective October 13, 2008, Congress raised the range for statutory damages to \$1,000.00-\$200,000.00 and provided for damages of up to two million dollars per violation for willful infringement. Because plaintiff’s complaint, filed on July 1, 2008, alleges infringement occurring before the effective date of these amendments, the Court applies the prior version of section 1117.

1 admitted on default). Evidence submitted by plaintiff also could support an  
 2 inference that defendant intentionally and willfully employed counterfeit versions  
 3 of plaintiff's mark. Johnson Decl., at ¶3-7 and Exs. A-D; Stickle Decl., at ¶4; Drey  
 4 Decl., at ¶3-5, Ex. F.

5 Plaintiff asks the Court to award statutory damages of \$50,000 per violation  
 6 for each of five violations. Plaintiff establishes a violation of the Lanham Act for  
 7 each different mark used without authorization by defendant. 15 U.S.C.  
 8 §1117(c)(1). Plaintiff has submitted evidence, unrebutted by defendant, that  
 9 supports a finding that defendant used the following five marks registered by  
 10 Adobe in the sales of defendant's counterfeit software: "Adobe Photoshop,"  
 11 "Adobe Creative Suite," "Adobe System Incorporated," "Adobe," and the logo  
 12 "A" written as a stylized block letter against a contrasting background. Johnson  
 13 Decl., at Exs. A-D; Drey Decl., at Ex. E; Complaint at Ex. B; Transcript of January  
 14 14, 2009, hearing.

15 Plaintiff seeks statutory damages of \$50,000.00 per violation. Plaintiff seeks  
 16 an amount within the range for "innocent" infringement despite having established  
 17 willfulness. Plaintiff also seeks statutory damages in connection with only five  
 18 violations even though it appears defendant may have sold many more counterfeit  
 19 goods using more than five of Adobe's marks.<sup>4</sup> In its Complaint plaintiff alleges  
 20 that defendant has sold more than one thousand unauthorized copies of Adobe  
 21 software. Complaint at 4:18. Moreover, e-mail correspondence between the  
 22 defendants supports an inference that defendants sold most or all of twenty  
 23 "items," that defendants would be listing "20-30 more pieces," and that defendants  
 24 intended to continue to make additional sales of software for at least another six  
 25 months. *E.g.*, Drey Decl., at Ex. F (e-mails from defendant Taveira to Mr. Royal

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26  
 27 <sup>4</sup>Plaintiff asserts that Mr. Royal has infringed substantially more than five of Adobe's marks but  
 28 that Adobe chooses to seek statutory damages with respect to only five violations in an effort to reassure  
 the Court that its request for damages is reasonable. Transcript of January 14, 2009, hearing.

1 dated February, 25, 2008 and February 28, 2008 and e-mails from Mr. Royal to  
2 defendant Taveira dated March 4, 2008 and March 11, 2008).

3 We recommend that the District Judge find that statutory damages of  
4 \$50,000.00 per violation are reasonable where, as here, plaintiff has established  
5 that defendant intentionally and willfully infringed plaintiff's marks in a self-  
6 conscious effort to palm off pirated copies of plaintiff's software as emanating  
7 directly from plaintiff. A significant damages award is necessary to deter a  
8 defendant who has intentionally and willfully infringed plaintiff's rights and who  
9 is aware of these proceedings but attempts to avoid answering for his conduct by  
10 failing to appear in this action.

11

12 **B. Permanent Injunction**

13 Section 1116 of the Lanham Act authorizes the Court to enjoin defendant  
14 from infringing plaintiff's registered marks "according to principles of equity." 15  
15 U.S.C. 1116(a).

16 Plaintiff's complaint asserts both copyright and trademark infringement, and  
17 plaintiff seeks an injunction prohibiting defendant Juan Royal from infringing  
18 plaintiff's rights in copyrighted computer software and prohibiting defendant from  
19 using Adobe's marks. Motion at 10; Complaint at 6-8. Based on the record before  
20 the Court it appears likely that Mr. Royal has violated plaintiff's copyrights.  
21 However, the substance of plaintiff's Motion for Default Judgment relates almost  
22 exclusively to Mr. Royal's violation of the Lanham Act. Because plaintiff has not  
23 satisfied the procedural predicates for obtaining entry of default on plaintiff's  
24 copyright claim, the Court is unable to make findings that would support a  
25 recommendation that entry of default on that claim is appropriate under the factors  
26 set forth in *Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986). Therefore, at this  
27 juncture, we consider whether plaintiff has established its entitlement to an  
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1 injunction that prohibits further trademark infringement but that does not embrace  
2 plaintiff's copyright claim. See, Transcript of January 14, 2009, hearing.

3 Courts determining whether to issue a permanent injunction consider the  
4 following equitable factors: "(1) that [the plaintiff] has suffered an irreparable  
5 injury; (2) that remedies available at law, such as monetary damages, are  
6 inadequate to compensate for that injury; (3) that, considering the balance of  
7 hardships between the plaintiff and defendant, a remedy in equity is warranted; and  
8 (4) that the public interest would not be disserved by a permanent injunction."  
9 *eBay, Inc. v. MercExchange L.L.C.*, 547 U.S. 388 (2006) (claim for patent  
10 infringement).

11 Plaintiff has established liability by virtue of defendant's default.  
12 Trademark infringement risks harm to plaintiff that may be difficult to calculate.  
13 In contrast, the risk of harm to defendant that would be created by issuance of the  
14 injunction is small. Therefore, if plaintiff has demonstrated a significant threat of  
15 future violations this Court will recommend that the injunction issue.

16 Defendant has not appeared in this action. The record supports a finding  
17 that defendant has self-consciously engaged in unlawful conduct directed at  
18 Adobe. Moreover, several pieces of information in the record could support an  
19 inference that defendant has engaged in high volume sales of counterfeit versions  
20 of Adobe's software bearing Adobe's registered marks and that Mr. Royal intends  
21 to continue doing so over a substantial period of time. The evidence also supports  
22 an inference that he intends to increase the number of channels through which he  
23 distributes his counterfeit products. In an e-mail dated March 4, 2008, Mr. Royal  
24 stated to co-defendant an intention to continue selling Adobe software for, at least,  
25 an additional six months. Drey Decl., at Ex. F. ("hopefully I can find more items  
26 so that we can make it thru the summer"). Furthermore, on March 11, 2008, Mr.  
27 Royal directed Ms. Taveira to expand the number of channels through which  
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1 defendants distributed their counterfeit products by opening additional accounts  
2 with ebay and by using other “outlets” (e.g., amazon.com). Drey Decl., at Ex. F  
3 (“Also, anyway we could list more (like 10 a day) using multiple accounts or  
4 outlets”). Ms. Taveira responded by asking what price she should list on amazon.  
5 Drey Decl., at Ex. F (March 11, 2008 e-mail from Taveira to Royal).

6 In light of the record, neither plaintiff nor the Court can be confident that  
7 defendant will cease his infringing behavior. Given all of these factors, the Court  
8 concludes that plaintiff has demonstrated a significant risk that defendant will  
9 continue to violate the trademark laws by continuing to try to sell counterfeit  
10 versions of Adobe’s marks on pirated software.

11 Therefore, we RECOMMEND that the District Judge enjoin defendant Juan  
12 Royal as follows.

13 “Juan Royal and his agents, servants, employees and all persons in active  
14 concert and participation with them are permanently enjoined from:

15 Directly or indirectly infringing Adobe’s trademarks in any manner,  
16 including generally, but not limited to, by offering for sale any products which  
17 picture, reproduce, copy or use the likenesses or bear a confusing and/or  
18 substantial similarity to any of Adobe’s trademarks,

19 Distributing any unauthorized promotional materials, labels, packaging or  
20 containers which picture, reproduce, copy or use the likenesses of or bear a  
21 confusing and/or substantial similarity to any of Adobe’s trademarks,

22 Engaging in any conduct that tends to falsely represent, or is likely to  
23 confuse, mislead or deceive purchasers, Defendant’s customers and/or members of  
24 the public to believe that the actions of Defendant, the products sold by defendant,  
25 or defendant himself are/is connected with Adobe, are sponsored, approved or  
26 licensed by Adobe, or are in some way affiliated with Adobe, and

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Affixing, applying, annexing or using in connection with the importation, manufacture, distribution, advertising, sale and/or offer for sale or other use of any goods or services, a false description or representation, including words or other symbols, tending to falsely describe or represent such goods as being those of Adobe.”

**C. Post-judgment interest**

Plaintiff seeks and is entitled to post-judgment interest as provided by 28 U.S.C. §1961(a). Motion at 14.

Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding.<sup>5</sup> the date of the judgment.

28 U.S.C. §1961(a).

We RECOMMEND that the District Judge enter a judgment in favor of plaintiff and against Juan Royal that includes post-judgment interest pursuant to 28 U.S.C. §1961(a).

**III. Conclusion**

We RECOMMEND that the District Judge enter judgment in the amount \$250,000.00 in favor of plaintiff and against defendant Juan Royal on plaintiff's second claim for trademark infringement, together with post-judgment interest at the rate provided by 28 U.S.C. §1961(a).

We further RECOMMEND that the District Judge enter the permanent injunction set forth in section II.B. above.

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<sup>5</sup>This period is in the original and most likely was unintentional. See, 28 U.S.C. §1961(a).

1                   **Plaintiffs must immediately serve defendant with a copy of this Report**  
2                   **and Recommendation.**

3                   IT IS SO REPORTED AND RECOMMENDED.

4                   Dated: January 16, 2009

  
\_\_\_\_\_  
WAYNE D. BRAZIL  
United States Magistrate Judge

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6                   Copies e-mailed to:  
7                   parties of record,  
8                   PJH, WDB, stats

9                   plaintiff instructed to serve defendant

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